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No. 88-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

ELBERT SMITH, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

---

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees move the Court pursuant to Sup. Ct. Rule 16 to affirm the judgment below on the ground that the questions presented in the jurisdictional statement are so insubstantial as not to require further argument.

OPINIONS BELOW

The opinion of the three-judge district court finding a violation of Section 2 of the Voting Rights Act (J.S. App. A) is reported at 687 F.Supp. 1310 (E.D. Ark. 1988). The district court's opinion on the remedy issue (J.S. App. C) is reported at 687 F.Supp. 1361 (E.D. Ark. 1988).

STATEMENT OF THE CASE

This case was brought by eleven black voters of Arkansas House District 48-49, which is located entirely within Crittenden County, Arkansas, alleging that the at-large election of two members of the Arkansas House of Representatives from the district unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The plaintiffs initially moved for a preliminary injunction to block the March 8, 1988 party primary for the district's two seats, but the three-judge district court denied the motion, in large part because of its view that any harm could be rectified by setting the primary election aside after a trial on the merits. *Smith v. Clinton*, 687 F.Supp. 1310, 1312 (E.D. Ark. 1988) (three-judge court) (J.S. App. A-4).[1]

A trial on the merits was held on April 25 and 26, 1988. At the conclusion of the trial, the district court announced from the bench its finding of a violation of Section 2, and also announced that it was setting aside the results of the March 8 primary. On May 16, 1988, the court issued a written opinion explaining the reasons for finding the Section 2 violation. Following this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court found (1) that black citizens in District 48-49 are sufficiently numerous and geographically compact to constitute a majority in a single-member district, (2) that black voters are politically cohesive, and (3) that the white majority votes sufficiently as a bloc usually to defeat the candidates of choice of black voters. 687 F.Supp. at 1315-1317; J.S. App. A-10-A-15. House District 48-49 is 42 percent black in population and 37 percent black in voting age population. *Id.* at 1312; J.S. App. A-3. After noting that black voters

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[1] The appellants are simply wrong when they say the preliminary injunction was denied because of "laches." J.S. 4.

generally support black candidates, and in light of evidence that no black citizen in the twentieth century has been elected to the legislature from Crittenden County or District 48-49, the district court found that "[s]o long as the present situation is allowed to continue, there will probably never be a black State Representative from Crittenden County. . . ." 687 F.Supp. at 1318; J.S. App. A-17.

In addition, the district court found a history of discrimination and a legacy of socioeconomic disparities which inhibit the political opportunities of black citizens in Crittenden County, as well as the use of numbered posts, the use of a majority vote requirement in party primaries, and the absence of a subdistrict residency requirement that enhance the dilution of black voting strength in at-large voting. 687 F.Supp. at 1317-1318; J.S. App. A-15 - A-16. Considering all of these factors within the context of the totality of the circumstances in Crittenden County, the district court concluded "that the multimember configuration of District 48-49 deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice." 687 F.Supp. at 1318, J.S. App. A-17.[2]

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[2] The appellants wrongly suggest that the district court considered one of the "essential elements" of plaintiffs' Section 2 claim to be that black citizens have not won elections in proportion to their percentage in the population. J.S. 5. Instead, the district court simply followed this Court's lead in *Thornburg v. Gingles*, 478 U.S. at 48 n.15, by looking at the extent to which minority group members have won elections in the jurisdiction in question, without requiring any type of proportional representation. 687 F. Supp. at 1315-1318; J.S. App. A-13, A-16 - A-17.

In addition, the district court rejected the validity of the evidence which the appellants mention at J.S. 6, and by which they attempted to prove that black citizens register to vote in higher proportions than white citizens in Crittenden County. Instead, the district court held that no convincing evidence had been introduced regarding the relative voter registration rates of whites and blacks. 687 F. Supp. at 1318; J.S. App. A-16.

The district court then invited all parties to submit proposed remedial plans. Defendants chose not to submit any remedial plans, and the only proposal before the court was one presented by the plaintiffs which divided the district into two single-member districts, one majority black and one majority white. After an evidentiary hearing, the district court adopted the plan proposed by the plaintiffs, setting out its reasons in an opinion dated July 7, 1988. *Smith v. Clinton*, 687 F.Supp. 1361 (E.D. Ark. 1988) (three-judge court); J.S. App. C. Contrary to the assertion of the appellants that the court relied only upon "national data" in ordering this plan into effect, J.S. 7, the district court held the plan to be a proper remedy after analyzing voting patterns and socioeconomic disparities in Crittenden County, including evidence that black voters participate at lower rates than whites as a result of socioeconomic deprivation. 687 F.Supp. at 1363; J.S. App. C-4 - C-5. In addition, the district court noted that the appellants had chosen not to say whether it was feasible to design a plan they felt would be preferable to that adopted by the district court. 687 F.Supp. at 1362; J.S. App. C-3.

ARGUMENT

This case is a routine, run-of-the-mill Section 2 at-large election challenge well within the ambit of this Court's controlling decision in *Thornburg v. Gingles* that fails to present any substantial questions that require plenary consideration by this Court. The questions presented (J.S., pp. i-ii) concerning challenging at-large elections in only one district, the district court's denial of a continuance, and the adding of additional defendants to grant full relief are so insubstantial that they are merely listed, but not discussed by appellants in their jurisdictional statement (J.S. 11). On the issue of which elections to look at to determine racially polarized voting, appellants are wrong when they assert that the district court limited its analysis to black-white contests. The

district court admitted and considered all the statistical evidence presented by both plaintiffs and defendants concerning both black-white contests *and* elections in which only white candidates ran (687 F.Supp. at 1316; J.S. App. A13). But in the context of this case the trial court determined that the evidence of polarization in black-white contests was so strong that it overcame all reasonable inferences from elections in which only whites ran for office (687 F.Supp. at 1317; J.S. App. A-14). Further, appellants are estopped from challenging the district court's decision to re-run the party primary election on the basis of single-member districts since that was a solution they themselves suggested in opposing appellees' preliminary injunction motion and is a form of relief that is well within the discretion of the district court.

Each of the issues raised by the appellants will be discussed in the order presented in the list of "questions presented" in the jurisdictional statement. In considering whether any of these issues merit further argument, and whether the district court should be reversed—as appellants suggest—it is important to remember that the district court's findings rest upon the district court's "intensely local appraisal" (*Thornburg*, 478 U.S. at 78, *quoting White v. Regester*, 412 U.S. 755, 769-70 (1973)) of the impact of at-large voting and that the district court's ultimate finding of dilution is a finding of fact which should not be reversed unless clearly erroneous. *Thornburg v. Gingles*, 478 U.S. at 78-79.

I. NOTHING WAS IMPROPER ABOUT THE DISTRICT COURT'S CONSIDERATION OF A CHALLENGE TO ONLY ONE LEGISLATIVE DISTRICT RATHER THAN THE ENTIRE STATEWIDE REDISTRICTING PLAN.

The appellants do not present any discussion of this issue in their jurisdictional statement. It is not a substantial issue, inasmuch as courts frequently find that

only particular districts within a given redistricting scheme dilute black voting strength. *See Thornburg v. Gingles*, 478 U.S. at 35 (noting that the case challenged only seven of North Carolina's legislative districts); *White v. Regester*, 412 U.S. 755, 759, 765 (1973) (findings of racial vote dilution in the Texas legislative districting plan limited to two counties). Indeed, as this Court pointed out in *Gingles*, vote dilution analysis in a case under Section 2 should proceed on a "district-specific" basis. 478 U.S. at 59 n.28. Finally, as the district court noted, the plaintiffs may lack standing to challenge legislative districts in other parts of the state. 687 F.Supp. at 1313; J.S. App. A-6. For all of these reasons, the district court properly considered the challenge to one legislative district without requiring the plaintiffs to include within their lawsuit all of the legislative districts in the state.

II. THE ISSUE OF THE DISTRICT COURT'S DENIAL OF A CONTINUANCE IS NOT DESERVING OF FURTHER ATTENTION FROM THE COURT.

The appellants fail to allege in their jurisdictional statement any prejudice from the denial of their motion for a continuance of the scheduled trial date. Indeed, no discussion of this issue is contained in the text of the jurisdictional statement. Appellants' expert witness on voting statistics gave extensive testimony which was admitted in evidence by the trial court (687 F.Supp. at 1316; J.S. App. A-12 - A-13). The grant or denial of a continuance is within the discretion of the district court, and the issue is so frivolous as to require no further argument.

III. IN ANALYZING VOTING PATTERNS, THE DISTRICT COURT PROPERLY ADMITTED AND CONSIDERED EVIDENCE OF ALL ELECTIONS PRESENTED BY THE APPELLANTS AND BASED ITS ULTIMATE FINDING OF DILUTION ON MORE THAN EVIDENCE OF POLARIZED VOTING AND THE HISTORICAL ABSENCE OF BLACK LEGISLATORS FROM THE DISTRICT AT ISSUE.

In listing the "questions presented" in their jurisdictional statement, the appellants describe the third issue as follows: "Whether the court below improperly based its finding . . . solely upon evidence of racially polarized voting in eight black versus white elections and upon the fact that no black had previously won a seat in the Arkansas House of Representatives from the district in issue." This appears to encompass two separate contentions: first, that the district court failed to consider evidence of voting patterns in elections involving white candidates only, and second, that the district court's ultimate conclusion was based only on evidence of polarized voting and the absence of black legislators. These are addressed in order.

With respect to the first, it is simply incorrect to suggest that the district court failed to consider evidence of elections involving only white candidates. The district court clearly acted on the assumption that all such evidence was admissible and explicitly considered this evidence in finding the existence of polarized voting. 687 F.Supp. at 1316-1317; J.S. App. A-13 - A-15. To the extent the district court emphasized the importance of the patterns of racial bloc voting in elections with both white and black candidates, it was doing nothing more than following this Court's decision in *Thornburg v. Gingles* in which the Court affirmed findings of racially polarized voting based on black versus white candidate election contests. 478 U.S. at 52, 80-82. There is no conflict among the circuits or among the lower courts on this

issue. Every court presented with this issue also has relied heavily upon the voting patterns in elections involving both white and black candidates. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-504 (5th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987); *McNeil v. City of Springfield*, 658 F.Supp. 1015, 1030 (C.D. Ill. 1987); *East Jefferson Coalition v. Parish of Jefferson*, 691 F.Supp. 991, 1000-1001 (E.D. La. 1988).[3] If the appellants were to have their way, and this Court were to reverse the district court's finding of dilution because black voters (along with white voters) occasionally supported the winning candidate in white versus white elections in Crittenden County, this Court would be permitting the continuation of an electoral system in which, as the district court put it, "[c]andidates favored by blacks can win, but only if the candidates are white." 687 F.Supp. at 1318; J.S. App. A-17.

The second part of this issue—the contention that the district court's ultimate conclusion was improperly based on nothing more than findings of polarized voting and the absence of black representatives from the challenged district—is not even discussed in the textual portion of the jurisdictional statement. Moreover, it is demonstrably in-

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[3] The district court's decision in *Collins v. City of Norfolk*, 679 F. Supp. 557 (E.D. Va. 1988), *appeal pending*, No. 88-3950 (4th Cir.), cited by the appellants, J.S. 10, is not to the contrary inasmuch as the *Collins* court never confronted this issue. The issue in that case was not whether the election results in elections in which only white candidates were running disproved legally significant bloc voting, but whether elections in which both black and white candidates were running could count as a minority electoral success when black candidates who were preferred by high percentages of the black vote were defeated by white candidates who received black majorities but lower black vote percentages. See *Collins v. City of Norfolk*, 816 F.2d 932, 937 (4th Cir. 1987).

correct. In addition to finding polarized voting and an absence of black elected officials, the district court also found that black citizens can form a majority in a single-member district and that they are electorally disadvantaged by a history of discrimination, socioeconomic disparities, numbered posts which operate as anti-single-shot voting devices, a majority vote requirement in party primaries, and the absence of a subdistrict residence requirement. 687 F.Supp. at 1315-1318; J.S. App. A-15-A-16.[4] The district court specifically stated that it was considering all of the relevant evidentiary circumstances in reaching its conclusion. 687 F.Supp. at 1314, 1318; J.S. App. A-9, A-15 - A-17.

IV. THE APPELLANTS WAIVED THEIR RIGHT TO APPEAL THE DISTRICT COURT'S ACTION VOIDING THE MARCH 8, 1988 PRIMARY ELECTION AND ORDERING A SPECIAL PRIMARY ELECTION ON SEPTEMBER 20, 1988.

On February 16, 1988, the district court held a hearing on plaintiffs' motion for preliminary injunction at which the plaintiffs urged that the upcoming March 8, 1988 party primary be postponed pending a trial on the merits. The defendants, who are appellants in this Court, opposed that motion and during the course of the hearing stated to the district court that, if it let the election go forward and later ruled for the plaintiffs on the merits, it then could set the primary aside and hold a special primary election:

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[4] Indeed, the appellants' attorneys seem a bit confused. In the "questions presented," they say the district court's finding of a Section 2 violation was based "solely" on polarized voting and the absence of black elected officials. At page 11 of the jurisdictional statement, however, when again listing the issues, they state that the question is whether the district court's conclusion was improperly based on polarized voting and the depressed socioeconomic status of black citizens.

> [Mr. Rubens, attorney for the defendants]: We would further expect the proof to show that the plaintiffs have got to show irreparable harm. We submit that the proof will show that the plaintiffs are voters in this case and that if the Court ultimately grants the relief that is sought the voters will again be allowed to go to the polls. And, therefore, we do not think that there will be irreparable harm.
>
> JUDGE ARNOLD: Are you suggesting, Mr. Rubens, that if we deny the preliminary relief and the election took place, the primary took place, and then there was a trial on the merits and we held for the plaintiffs and this took place sometime before November that we would then void the March 8 primary and direct a new primary?
>
> MR. RUBENS: Your Honor, I believe that is a possibility. I believe it was discussed in *Halifax versus Johnson*, and I am bad for case citations, Your Honor, but in one of the cases in our brief we pointed out to the Court that there are instances where the Court even finds that plaintiffs are likely to succeed on the merits but because of the untimeliness and the harm to the public at large of cancelling an election the Court goes ahead and just does that and then says we'll deal with that problem when we get to it. And that, yes. So I guess to answer the Court directly, yes, sir, I am.
>
> JUDGE ARNOLD: All right.

Transcript of February 16, 1988 hearing, pp. 11-12. The district court followed the exact path suggested by counsel for the defendants-appellants. Having urged it upon the district court, the appellants have waived any right to appeal the district court's action in that respect.

Indeed, at no time after the trial on the merits or during the remedial proceedings did the appellants preserve this issue in the district court by objecting to the setting aside of the primary or the ordering of the

special election (except to the extent they objected to any relief because they contended they should have prevailed on the merits). The only time such an objection was lodged was in the post-judgment motion to the district court asking that court to stay its judgment—at which time it was far too late to raise a new issue and preserve it for appeal.

Finally, even if the issue had been preserved, the fashioning of a remedy—including the setting aside of an election and the ordering of a special election—is within the discretion of the district court. *See Connor v. Finch*, 431 U.S. 407, 414 (1977). Had the district court failed to do what it did, it would have been two years before the violation could be remedied at the next regular election. Instead, the district court fully complied with the intent of Congress in enacting the 1982 amendment to Section 2 that once a violation was found, full relief should be granted:

> The court should exercise its traditional equitable powers to fashion the relief so that it *completely remedies* the prior dilution of minority voting strength and *fully provides* equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 208 (emphasis added, footnote omitted).

Clearly, the district court's action was within its remedial discretion, and need not be the subject of further argument before this Court.

V. THE ISSUE OF WHETHER THE DISTRICT COURT PROPERLY ADDED ADDITIONAL DEFENDANTS IN ORDER TO EFFECTUATE ITS JUDGMENT WAS NOT PRESERVED BELOW AND IS NOT DESERVING OF FURTHER ATTENTION FROM THIS COURT.

Nowhere in the text of the jurisdictional statement do appellants even discuss this issue, much less explain why they think the district court was in error, why they were prejudiced by the district court's action, or why they think the issue is worthy of review by this Court. At no time in the district court did the appellants object to the addition of certain defendants in order to effectuate the district court's judgment. That type of action is within the discretion of the district court and should not occupy further argument before this Court.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the final judgment of the district court should be affirmed.

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA GRESHAM, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
vs.	)	1:87-CV-867-JOF
JOE FRANK HARRIS,	)	
et al.,	)	
Defendants.	)	

ORDER

This action under the Voting Rights Act is before the three-judge court on the plaintiff's motion for a permanent injunction. The plaintiffs seek to extend this court's preliminary injunction, which enjoined the defendants from impelementing

any voting changes directed by the Burke County Superior Court in its December 30, 1987 order absent preclearance under section 5 of the Voting Rights Act. For the reasons discussed below, the plaintiff's motion for a permanent injunction will be granted.

I. FACTS AND PROCEDURAL HISTORY.

The following facts were stipulated by the parties at the January 14, 1988 hearing before the three-judge court.

1. The plaintiffs are black registered voters and residents of Burke County, Georgia.

2. The town of Keysville was incorporated in 1890 pursuant to Georgia Law 1890-91, Volume II, p. 657.

3. The boundaries of Keysville were fixed by the Legislature and extend "one-half mile in every direction from the schoolhouse which is now located in said town of Keysville." Id. The boundaries of the town have never been changed subsequent

to their designation in the original act of incorporation by legislative act or municipal annexation.

4. The schoolhouse referred to in the 1890 Georgia law was destroyed and its exact location is in dispute.

5. There are approximately 165 registered voters in the town of Keysville (as defined by the boundaries used by Burke County officials for the January 4, 1988 elections), of whom the majority are black.

6. Pursuant to its act of incorporation the municipal government of Keysville consists of a mayor and five council members elected on the first Monday in January 1891 and on the same day annually thereafter for one-year terms of office.

7. Keysville is a current municipality of the State of Georgia. However, until January 4, 1988 there had been no elections

for the mayor and council and no municipal office holders since approximately 1933.

8. For several years the plaintiffs and other black residents of Keysville tried to reactivate the municipal government of Keysville and elect a mayor and council.

9. In 1985, the Burke County attorney, on behalf of Keysville residents, requested the State Attorney General to advise him how to reactivate the municipal government. The Attorney General responded by letter dated August 2, 1985.

10. The Georgia Municipal Election Code, O.C.G.A. Section 21-3-408(b), provides that in the event of a vacancy in any municipal office, and if, as in Keysville, the municipal charter fails to provide a method for the filling of such vacancy, "the governing authority shall thereupon call a special election to fill such vacancy."

11. All municipal elections are

conducted by "the superintendent, registrars, deputy registrars, poll officials and other employees" selected by the governing authority. O.C.G.A. Section 21-3-8(3).

12. Since the offices of the governing authority for Keysville were vacant, and pursuant to the advice of the Attorney General, the plaintiffs and other residents of Keysville conducted a town meeting on September 5, 1985, after which plaintiff Turetha Neely and Upton Cochran were given an oath of office as punitive co-superintendents of election by the probate judge of Burke County, and called a special election for the mayor and council for January 6, 1986.

13. Plaintiff Emma Gresham qualified for mayor and plaintiffs Clayton Neely, Jr., Anfield, Wright, Streetman, and Earl M. Neely qualified for the council. None of

these candidates had any opposition and, after the closing of the qualifying time but before the scheduled election, all were declared elected and were administered the oath of office by the probate judge on December 30, 1985.

14. On the same day, five white citizens of Keysville, who are the intervenors in this case, sought and were granted a temporary restraining order by the Superior Court of Burke County enjoining plaintiff Turetha Neely, the Board of Registrars of Burke County, and others from holding the elections on January 6, 1986 on the grounds that the elections were not being held in conformity with state law.

15. On January 17, 1986, the superior court issued a preliminary injunction enjoining the scheduling or conducting of any municipal election for Keysville until all the requirements of state law were met.

16. It was not possible for elections for the mayor and council to be conducted in literal conformity with the Georgia Municipal Election Code since the offices of the governing authority, which has the duty of calling elections and selecting election officials, were vacant.

17. The plaintiffs requested the members of the Georgia General Assembly who represent Burke County to introduce and enact legislation reactivating the government of Keysville, but the legislators refused.

18. Pursuant to Article V, Section II, para. VII of the Constitution of Georgia, "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law."

19. The plaintiffs and other residents of Keysville requested the Governor to

exercise his constitutional authority and appoint persons to the mayor and council of Keysville, but the Governor upon the advice of his Executive Council and the Attorney General refused to do so.

20. The Georgia General Assembly enacted Georgia Laws 1987, p. 178, which was precleared by the Attorney General of the United States and became effective on July 1, 1987, providing that:

> in the event that all seats on the governing authority of a municipality are vacant, the elections superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The Board of Registrars for the county shall prepare the electors list for the special election.

O.C.G.A. Section 36-30-13.

21. The office of the Attorney General of Georgia wrote to the Secretary of State concerning O.C.G.A. Section 36-30-13 dated

August 7, 1987.

22. The Burke County election board, pursuant to Section 36-30-13, called an election for January 4, 1988 to fill the vacancies in the municipal government of Keysville. The call for the election, together with a map designating the boundaries of the town and showing the area from which persons would be allowed to vote, were prepared by Burke County officials and submitted to the Attorney General of the United States pursuant to section 5. The submission was precleared on December 9, 1987.

23. On December 3, 1987, the plaintiffs in Poole v. Lodge, Civil Action No. 85-V-414, a group of white residents of Burke County, filed a motion to enjoin the county election board and board of registrars from conducting the January 4, 1988 elections on the ground that the

boundaries of Keysville had not been determined.

24. The superior court held a hearing on the motion on December 30, 1987 and, in an order entered December 31, 1987, enjoined the January 4, 1988 elections. The court also enjoined the defendants "from taking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly determined in accordance with the requirements of law."

25. On December 30, 1987, the plaintiffs filed a motion for a temporary restraining order and preliminary injunction in this case to enjoin the defendants from implementing the voting changes contained in the state court order absent preclearance under section 5. Judge Forrester, sitting as a single judge court, held a hearing on

the motion on December 31, 1987, at which counsel for the county and state defendants indicated that the voting changes contained in the state court order were required to be precleared under the Voting Rights Act prior to being implemented.

26. Following the hearing, Judge Forrester granted the plaintiffs' motion to join the Burke County Board of Elections and the Board of Registrars as additional party defendants, ruled that the voting changes contained in the state court order were subject to section 5, granted the motion for a temporary restraining order, and enjoined the defendants from failing to conduct the precleared January election.

27. The election was held as scheduled on January 4, 1988. Four blacks and one white were elected to the city council and a black was elected mayor.

On January 13, 1988, Judge Roney, Chief

Judge of the Eleventh Circuit, designated Circuit Judge J. L. Edmondson and District Judge Robert H. Hall to serve with Judge Forrester as members of a three-judge court to hear and determine the action pursuant to 28 USCA Section 2284(b)(1). The motion by James E. Poole, Jr., William C. Harmon, J. W. Marshall, Fred Muns, Louie B. Way, and Julian H. Kight to intervene was granted.

The three-judge court held a hearing on January 14, 1988 on the plaintiff's motion for a preliminary injunction. Based upon the foregoing evidence and after hearing oral argument, the court granted the preliminary injunction, reasoning that a state court may change a precleared election date or halt a precleared election only if the court first obtains preclearance of its order. The parties consented to the use of the record developed at the hearing as the basis for the court's ruling on the

plaintiff's motion for a permanent injunction. The court directed the parties to submit post-hearing briefs and took the plaintiffs' motion for a permanent injunction under advisement.

II. DISCUSSION. 1

Section 5 of the Voting Rights Act, found at 42 USC 1973c, requires that any

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1 Though the intervenors objected at the January 14 hearing that venue in the Northern District is improper under 28 USC 1391 -- because arguably the claim arose in the Southern District and the Burke County defendants reside there -- it is not necessary for the court to decide which district is the proper venue for this case. First, venue is a personal privilege that cannot be raised by one party on behalf of another, Camp v. Gress, 250 U.S. 308, 316 (1919), and that is waived if it is not raised. See, e.g., Leroy v. Great Western United Corporation, 443 U.S. 173, 180 (1979). The Burke County defendants stipulated at the hearing that they do not object to this venue. Second, an intervenor cannot object to venue. See, e.g., 3B Moore's Federal Practice para. 24.19 at 24-901. Finally, the intervenors here appear to have dropped the objection, since they do not raise it in their post-hearing brief.

state or political subdivision covered by the Act submit to federal scrutiny "any voting qualifiction or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The requisite "preclearance" may be obtained in one of two ways:

> First, the State or political subdivision may institute an action in the District of Columbia for a declaratory judgment that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; second, it may submit the proposed change to the Attorney General. No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him. Attempts to enforce changes that have not been subjected to section 5 scrutiny may be enjoined by any three-judge district court in a suit brought by a voter or by the Attorney General on behalf of the United States.

United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642, 645 (1977) (citations omitted).

It is undisputed in this case that the superior court order at issue applies to a political subdivision covered by the Voting Rights Act and that the order has not been precleared. The parties agree that the superior court order, if it enacts a change in voting procedure within the terms of section 5, must be precleared. See Hathorn v. Lovorn, 457 U.S. 256 (1982). In deciding this section 5 action, this court does not sit to determine whether the superior court order does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color" or to determine the validity of the superior court's interpretation of Georgia law. The only question before this court is whether the superior court order effects a change in

voting requirements that must be precleared under section 5 before being enforced.

The intervenors, the only parties opposing preclearance of the superior court order, advance several arguments against extending the preliminary injunction into a permanent injunction. None of the intervenors' arguments are persuasive. First, the intervenors argue that the superior court order did not effect a change in voting requirements under section 5 because the order changed neither the boundaries of Keysville nor the manner of holding elections there, because it did not institute a practice different from that in effect on November 1, 1964, because the January 4, 1988 election had not yet occurred and was therefore not yet a practice, and because the Attorney General had no previous practice with which to compare the superior court order.

Whether or not the superior court order changed the boundaries of Keysville, it is clear that the order did, at the least, change the date of the election, if not halt it altogether. A change in the date of an election, even if effected merely to comply with a statute that had already received clearance, requires approval by the Attorney General under section 5. NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985). The fact that the superior court order did not purport to change the boundaries of Keysville is irrelevant since the date change alone was sufficient to require preclearance.2

Contrary to the intervenors' textual argument, i.e., that the superior court

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2 It should also be pointed out that the preclearance itself had not changed the boundaries of Keysville either.

order effected no voting change since the practice in Keysville on November 1, 1964 was the same as that resulting from the superior court order, the benchmark for determining whether voting practices have changed is the most recent precleared practice if that practice post-dates November 1, 1964. See NAACP, DeKalb County Chapter v. State of Georgia, 494 F.Supp. 668, 677, (N.D.Ga. 1980) (three-judge court); 28 CFR section 51.54(b) ("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction"). As the court noted in NAACP, "the exact language of the statute would support" the intervenors' reading of section 5, but that reading "would lead to a result tantamount to repeal of the Act." 494 F.Supp. at 677.

Second, the intervenors argue that the superior court order is merely a judicial

decision enforcing previously precleared election law, specifically Georgia's residency requirement. Since the court determined that the town's boundaries were indeterminate, the argument goes, it could not be said that the electors identified by the county officials were residents of Keysville. In arguing that judicial decision construing precleared election law need not be precleared themselves, the intervenors rely heavily on Williams v. Sclafani, 444 F.Supp. 895 (S.D.N.Y. 1977) (three-judge court). 3 In Williams, the New York City Board of Elections informed a plaintiff candidate that persons registering on the street pursuant to New York's recently enacted mail registration statute

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3 This decision is not a precedent binding upon this court.

could simultaneously sign his designating petitions. In a subsequent suit in state court, the state supreme court held that the City Board's interpretation was erroneous and invalidated a number of the signatures on the plaintiff candidate's designating petitions. The district court held that "section 5 was not intended to cover a change in ... practice ... brought about by a state court decision construing or interpreting an already precleared state voting statute." Id. at 903. The intervenors argue that in this case, just as in Williams, the state's precleared election law was misinterpreted initially and that the state court's correction of the misinterpretation is not a change in practice that must be precleared.

Williams has no application to this case. First, the holding in Williams was based largely on that court's conclusion

that all state court decrees are outside the coverage of section 5. Id. at 903-04. That holding was repudiated by the Supreme Court in Hathorn v. Lavorn, 457 U.S. 255.

We note that the foundation of the intervenors' argument on this point is questionable. Careful analysis of the superior court order shows that the superior court did not construe the residency requirement -- nor did it rule that the county officials lacked the authority under the statute to determine Keysville's boundaries -- but instead held that, as a matter of fact, Keysville's boundaries could not be determined at all. That determination itself might be a change from the county officials' precleared conclusion that Keysville's boundaries could be determined.

Second, the intervenors argue that requiring preclearance of the superior court

order, "by logical extension," will lead to pernicious results. The intervenors argue that if preclearance is required here, it should also be required of any state court order entered in an election contest that changes election results or requires new elections. That question is not before us and need not be decided here. We do, however, note a difference between the two situations: results of elections are not normally precleared. A successful election contest that effects a change in election results may not need to be precleared if the election contest itself were conducted pursuant to precleared election law on election challenges. In such a situation, cases such as Williams may continue to have some application. The intervenors also argue that requiring preclearance in cases such as this allows state officials, who would normally be without power to do so, to

change municipality boundaries by submitting new boundaries for preclearance to the Attorney General. As the plaintiffs point out, however, it is highly unlikely that this course of events would ever occur and, it if were to happen, the improper but precleared boundaries may easily be changed by again submitting proper boundaries for preclearance.

Finally, the intervenors argue that if the superior court order must be precleared before being given effect, so that the January 4, 1988 election must be allowed to stand, the intervenors are without an adequate remedy for what they perceive to be a violation of state election law. Simply because the intervenors may not prevail in their post-election contest, presently pending in the state courts, however, does not render that remedy inadequate. Moreover, the intervenors remain free to

petition their legislators to remedy the situation by legislatively defining the boundaries of Keysville.

III. CONCLUSION.

In summary, the court concludes that its ruling on plaintiffs' motion for a preliminary injunction was correct. The superior court order changed a previously precleared practice and therefore should also have been precleared. The plaintiff's motion for a permanent injunction is GRANTED and the defendants are permanently enjoined from departing from the voting practices precleared by the Attorney General without obtaining preclearance for any subsequent changes, by judicial order or otherwise.

IT IS SO ORDERED this 30th day of June, 1988.

/s/ J. L. Edmondson

J. L. EDMONDSON

UNITED STATES CIRCUIT JUDGE

/s/ Robert H. Hall

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

/s/ J. Owen Forrester

J. OWEN FORRESTER

UNITED STATES DISTRICT JUDGE

EXHIBIT 2

IN THE SUPERIOR COURT OF BURKE COUNTY,
STATE OF GEORGIA

JAMES E. POOLE, JR., First Plaintiff, et al.	) CIVIL ACTION NO. 85-V-414
v.	)
HERMAN LODGE, Individually and as a member of the Burke County Board of Commissioners, First Defendant, et al.	) COURT'S ORDER ON PLAINTIFFS' MOTION FOR CONTEMPT, MOTION TO ADD A PARTY DEFENDANT AND MOTION TO EXPAND THE EXISTING INJUNCTION

The Plaintiff's Motion for Contempt, Motion to Add a Party Defendant and Motion to Expand the Existing Injunction having come before the Court for hearing on Wednesday, December 30th, 1987, the Court, after hearing the evidence, does hereby

enter the following findings of fact and make the following conclusions of law.

FINDINGS OF FACT

The Court finds that pursuant to the provisions of Act 160 of the 1987 Georgia General Assembly, Ralph B. Willis, as Superintendent of the Burke County Board of Elections, recently began making preparations for the holding of a special election for the municipality of Keysville, Georgia to fill the vacancies which presently exist with regard to the council and mayoral seats for Keysville, Georgia. In order to assist in his preparation for the election, Mr. Willis was provided with a map purporting to delineate the municipal boundaries for the town of Keysville, Georgia. The map had been prepared by James H. Bailey, the Chief Tax Appraiser and Tax Assessor for Burke County, Georgia. The purported municipal boundaries as prepared

by Mr. Bailey were shown on a Burke County tax map. Mr. Bailey prepared the map delineating the purported boundaries of Keysville after undertaking research in the Burke County record room attempting to locate the center of town.

Pursuant to the Act of Incorporation incorporating the town of Keysville, which Act was approved December 29th, 1890, the boundaries of the town were defined as extending "one-half mile in every direction from the schoolhouse now located in said town of Keysville". Mr. Bailey testified that in examining the Burke County records, he had discovered information which "I felt like indicated where the center of town was at". The deeds upon which Mr. Bailey testified that he relied in seeking to located the old schoolhouse were inconsistent in a number of ways. Mr. Bailey testified that based on his research,

he was unable to locate definitively either where the old schoolhouse or the schoolhouse lot was located in Keysville in 1890 and that the location which he chose for the center of town in preparing the boundary survey for the municipality of Keysville, was an approximation as to where he thought the schoolhouse would have been located inasmuch as he felt it was impossible to presently make any exact determination as to where the schoolhouse was located in Keysville in 1890. Mr. Bailey testified that his location for the center of town was just an estimation as to the location of the Academy or schoolhouse lot in 1890. The Court finds specifically that in making his approximation as to where the center of town was located, Mr. Bailey was apparently not aware of and did not rely upon a deed subsequently produced by the Defendants, which deed is dated November 16th, 1892 and

purports to convey unto the Burke County Board of Education a lot "known as the Academy lot" in the town of Keysville.

The Court finds that in beginning his preparations for the upcoming elections, Ralph Willis, the Elections Superintendent for Burke County, has accepted the map prepared by Mr. Bailey at its face value as correctly delineating the boundaries of the town of Keysville. Mr. Willis has used the boundaries as delineated on the map in making any determintion relative to the eligibility of candidates and intends to use these boundaries in determining the eligibility of electors voting for candidates within the town of Keysville.

The Court finds that in addition to the title work done by Mr. Bailey in attempting to locate the schoolhouse for purposes of delineating the Keysville municipal boundaries, the Attorney General's office

for the State of Georgia retained the services of John R. Murphy, a special Assistant Attorney General from Louisville, Georgia. Mr. Murphy was retained by the Attorney General's office for the purpose of attempting to locate from the public records of Burke County the location of the old schoolhouse that existed in 1890. Mr. Murphy in his search found no deed that described the school property as such. Mr. Murphy indicated that he did not think anyone could say for sure where the Academy property was located in 1890 and that it was impossible for him to determine definitively either where the old schoolhouse or schoolhouse lot was located. Mr. Murphy reached an opinion as to where the most likely location of the school property was, but that he could not, from his findings, direct a draftsman so as to enable him to draw a line with a circumference of one-half

mile and accurately depict the municipal boundaries of Keysville as those boundaries were set out in the Act of Incorporation of the town.

The Court further finds that the State Law Department of the State of Georgia has also undertaken an investigation in order to seek to determine the exact municipal boundaries for the town of Keysville. The Court finds that in addition to employing a special Assistant Attorney General in order to do title research, an employee of the State Attorney General's office did independent research seeking to locate information which would enable the boundaries of the town to be set. The Court finds that based on the research that was done by the Attorney General's office, the exact site of both the schoolhouse and the schoolhouse lot was incapable of determination. The Court further finds that

the Attorney General's office has, in the past, advised the Governor of the State not to appoint councilmen and a mayor to fill the existing vacancies for the municipality fo Keysville, in part because of the uncertainty of the location of the boundaries of the town. The Court finds that, at best, the Attorney General's office could delineate a general area with undefined limits within which the schoolhouse was probably located; however, at no time did the office of the Attorney General conclude where the actual municipal boundaries lie.

The Court finds that the deeds relied upon by Mr. Bailey and Mr. Murphy and the Attorney General's office in attempting to locate the old schoolhouse and in generalizing their location of the center of town for purpose of determination of the municipal boundaries are as follows:

1. A deed from L. A .Clark to Thomas B. Daniels dated April 7, 1890 and recorded in the Burke County Clerk's Office in Deed Book V, at pages 77-78. This deed conveys a three acre tract of land located gneerally within the area known as Keysville.

2. A deed from Thomas B. Daniels to Augusta Glass Works dated April 9, 1890 recorded in Deed Book V, at pages 77-78 of the Burke County Clerk's Office conveying a one acre parcel of the three acres received by Daniels from Clark.

3. A security deed from Augusta Glass Works to F. M. Whitney dated August 31, 1893 and recorded in the aforesaid Clerk's Office in Deed Book X, at pages 444-445. This security deed conveys to Whitney a security interest in two parcels of property owned by Augusta Glass Works. One of the two parcels of property conveyd is the one acre tract obtained from Thomas B. Daniels in the deed

noted above.

4. A deed from Phil P. Johnston to the Trustees of the Methodist Church dated November 22, 1894, recorded in Deed Book 5, at page 483 of the aforesaid Clerk's office. This deed conveys a lot of approximately seven-tenths of an acre.

All of the above-referenced deeds in some way reference the Keysville Academy property. The deed from Clark to Daniels indicates that the three acre tract conveyed is bounded "on the North by lands of Mrs. M. F. Cook and lot of Keysville Academy". The deed from Daniels to Augusta Glass Works conveying the one acre parcel indicates that the one acre parcel is bounded "on the North by lands now or formerly belonging to Mrs. M. F. Cook and lot, the Keysville Academy". The security deed from Augusta Glass Works to Whitney contradicts the deeds from Clark to Daniels and Daniels to Augusta Glass

Works in that it describes the one acre parcel owned by Augusta Glass Works which was purchased from Daniels as being bounded "East by lots of Thomas B. Daniels and Academy". It is, therefore, impossible to determine from these deeds whether the Academy lot was located North or East of the one acre tract owned by Augusta Glass Works.

The deed from Phil P. Johnston to the Trustees of the Methodist Church is dated November 22, 1894. Attached to the end of the deed and apparently recorded simultaneously with the deed is a plat or drawing of the seven-tenths acre lot being conveyed to the Methodist Church. As shown on this drawing or plat, the lot conveyed to the Methodist Church is bounded North by lands of Bradshaw, East by lands of Clarke, South by the Academy lot and West by lands of Daniels. The plat, however, is dated August, 1887, some seven years before the

date of the deed. The narrative description contained within the body of the deed completely contradicts the plat or drawing attached at the end of the deed to the extent that it recites that the land conveyed is "located and bounded on all sides by other lands of said Phil P. Johnston". Both Mr. Bailey and Mr. Murphy, in arriving at their generalized location for the center of town, relied heavily on the plat attached to the deed from Johnston to the Methodist Church.

Neither Mr. Bailey nor Mr. Murphy, when they undertook to locate the center of town, had the benefit of the 1892 deed from T. S. Clarke to the Burke County Board of Education. This deed was discovered in the Burke County Board of Education files and apparently had been delivered to the Board of Education, but never recorded. The deed

is dated November 16, 1892 and recites that it conveys a four-fifths acre tract located in the town of Keysville "known as the Academy lot". The deed recites that the property conveyed is bounded on the North by a public street, South by lot of T. B. Daniel, East by a vacant lot and "West by Mrs. M. F. Cook and Augusta Glass Co.". This deed would tend to contradict the plat attached to the Methodist Church deed to the extent that the schooldeed indicates the Academy lot was bounded on the North by a public road and not the Methodist Church lot. The Methodist Church plat, however, appears to depict the Academy lot as being located immediately south of the Methodist Church lot and adjoining the Methodist Church lot. There is no reconciliation of this conflict. The school deed also contradicts and conflicts with the descriptions contained in the deeds from

Clark to Daniels and Daniels to Augusta Glass Works. The school deed, is however, consistent with the description contained in the security deed from Augusta Glass Works to Whitney in that this security deed indicates the one acre parcel being conveyed is bounded on its East by the Academy and the school deed indicates it is bounded on its West by lands of Augusta Glass Company. Notwithstanding this agreement between these deeds, exact placement upon a plat or map of the lot conveyed to the Board of Education is impossible inasmuch as only a generalized location for the lot can be determined and further inasmuch as the deed to the Board of Education contains no lot dimensions, but rather only indicates that the lot size is four-fifths of an acre.

A 1906 plat of the town of Keysville also appears consistent with the Whitney security deed and the school deed in that it

depicts the one acre Augusta Glass Works property as having on its Northern boundary a lot owned by Mrs. M. F. Cook. Accordingly, to the extent that the school deed is correct and the school property was bounded on the West by lands of Cook and Augusta Glass Works, the center of town would have to be moved some 200 to 250 feet Southwest of the location presently used by Mr. Bailey to depict the town boundaries. The Court finds, however, that notwithstanding the generalized location of the school lot that could be made from these deeds, there is no evidence of the exact location or dimensions of the lot or of the exact location of the schoolhouse itself upon which the municipal boundaries were based.

In addition to the above evidence, the Court finds that the Defendants have submitted various affidavits which were

considered as evidence by the Court. One of the affidavits was given by one of the oldest living citizens of the Keysville area. This affidavit given by Mr. Henry Key indicates that he was born on August 8, 1895. Mr. Key's affidavit further indicates that "at the time of the incorporation of Keysville in 1890, a school for white students on which the city limits of Keysville is based and which was known as the Keysville Academy stood just Northeast of the present location of the Keysville Methodist Church next to a grove of large oak trees". The location which Mr. Key gives for the schoolhouse is some 300 feet Northeast of the location which is being used for purposes of the upcoming election. The location which Mr. Key gives for the schoolhouse is some 600 feet Northeast of the location for the Academy lot that is suggested by the Augusta Glass Company to

Whitney security deed and the Clark to Burke County Board of Education school deed. Although Mr. Key's affidavit indicates that he never personally saw the schoolhouse inasmuch as it was destroyed at approximately the time of his birth, the affidavit indicates that his information is based upon "conversations and discussions that I have had with my parents who were lifelong residents of Keysville and other residents of the Keysville area during my lifetime".

In addition to that affidavit, an affidavit of Mr. Roy Chalker, Publisher of the True Citizen, the official gazette for Burke County, Georgia, was offered. Mr. Chalker's affidavit had attached page 3 of an issue of the True Citizen dated March 7, 1891, less than three months after the incorporation of the town. That article indicated that there were problems in

locating the boundaries of Keysville even at that point in time. The article notes that at the time the town was incorporated "(U)nfortunately, the limits were not sufficiently circumscribed". It is, therefore, apparent to this Court that the problem with locating the municipal boundaries is not a new problem. All of evidence produced by the Defendants at the hearing does nothing to clear up the substantial conflicts which exist as to the location of either the schoolhouse or the lot upon which the schoolhouse sat. In fact, the Key affidavit and the Smith affidavit which had attached the deed from Clark to the Burke County Board of Education both contradict the location which has been selected by the County for use as the center of town.

The Court finds that based on all of the testimony given and all of the evidence

received by the Court, it is impossible even to delineate the boundaries of a lot or any number of lots on which the school might have been located. The best that can be done is to generalize areas where the lot might have been located.

The Court finds that as to the exact boundary line of the town, there is nothing less than absolute confusion. The Court finds that not only is there substantially conflicting evidence as to the location of the lot upon which the schoolhouse sat in 1890, but also that there is absolutely no evidence in the record as to where the schoolhouse itself was located. The Court finds that the present map purporting to delineate the municipal boundaries of Keysville were prepared based on an approximation of the location of the lot upon which the schoolhouse was located. The Court finds that there is no evidence of the

exact location or dimensions of any of the lots upon which the school may have been located and that no determination of the location of the schoolhouse itself has been made. The Court further finds that at best a generalized location of the school lot could be made, which location would be approximately 600 feet long and 200-300 feet wide. Based upon the evidence, any more accurate or narrow delineation of the lot appears impossible.

The Court finds from the evidence that any move in the generalized location of the center of town would substantially affect the number of persons who could vote in any election for the municipal offices for the town of Keysville and would also affect the eligibility of three of the announced candidates for office.

The Court finds that the boundaries of the town of Keysville which were submitted

to the United States Attorney General's office for preclearance pursuant to the provisions of Section 5 of the Voting Rights Act were improperly determined and are not supported by the evidence. The Court, accordingly, finds that those boundaries do not accurately depict the municipal boundaries of the town of Keysville in accordance with its Act of Incorporation.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes that it is proper for Ralph B. Willis, the Superintendent of the Burke County Board of Elections, to be made a party to this action and it is hereby ordered that the said Ralph B. Willis be made a party to this action and be served with copies of all pleadings previously filed in this case, together with a copy of this Order.

IT IS FURTHER ORDERED that the

municipal elections scheduled for the town of Keysville for January 4th, 1988 be and they are hereby enjoined; it being the determination of this Court that a determination as to the eligibility of candidates for the municipal offices and a determination as to the elgibility of voters for the municipal elections is impossible because of the inability to properly delineate the municipal boundaries in accordance with the Act of Incorporation for the town. The Court finds that there is no sufficient evidence to carry any burden with regard to a proper location for the center of town.

It is this Court's conclusion that the entry of this Order does not enact or seek to administer any standard or procedure with respect to voting different from that in force or effect on November 1, 1964. The Order of this Court does not in any way

change the municipal boundaries as submitted to the Attorney General's office for preclearance pursuant to Section 5 of the Voting Rights Act, but rather determines that the location of those boundaries is not supported by the evidence. Accordingly, this Court concludes that this Order is not subject to Section 5 preclearance.

IT IS FURTHER ORDERED that the Defendants are restrained and enjoined from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law.

It appearing to the Court that the Defendants have acted in good faith, no finding of contempt will be made against any of the Defendants.

SO ORDERED, this 31st day of December,